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No. 03-165

IN THE

Supreme Court of the United States

GENERAL MOTORS CORP.,
Petitioner,
v.
UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENTS ALLEGHENY TELEDYNE, INC., TELEDYNE, INC., TELEDYNE INDUSTRIES, INC., AND TELEDYNE ELECTRONIC SYSTEMS, INC. IN OPPOSITION

HARVEY G. SHERZER *
SCOTT ARNOLD
BRADLEY D. WINE
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037
(202) 785-9700

Counsel for Respondents Allegheny Teledyne, Inc., Teledyne, Inc., Teledyne Industries, Inc., and Teledyne Electronic Systems, Inc.

* Counsel of Record

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QUESTIONS PRESENTED

This case arises out of an interlocutory appeal regarding the meaning of a 1978 government contract Cost Accounting Standard ("CAS") that was substantially amended after the transactions that gave rise to the litigation. The 1978 version of CAS 413 governs the accounting for pension costs when a company closes a government contracting segment. The questions presented are:

1. Whether the Court of Appeals properly determined that the 1978 version of CAS 413 is clear on its face, and therefore declined to defer to unofficial statements of certain agency personnel that were inconsistent with the plain language of the regulation and the objectives of the agency that promulgated the regulation.

2. Whether the Court of Appeals properly determined that the 1978 version of CAS 413 does not create substantive rights of recovery, and does not require a repricing of fixed-price government contracts, years or even decades after completion of performance, based upon a surplus or deficit in a contractor's defined benefit pension plan.

RULE 29.6 STATEMENT

Allegheny Teledyne Incorporated was renamed Allegheny Technologies Incorporated after the commencement of this litigation. Allegheny Technologies Incorporated, the real party in interest, is a publicly held company and is the ultimate parent company of TDY Holdings, LLC, successor to Teledyne, Inc.; TDY Industries, Inc., formerly known as Teledyne Industries, Inc.; and Teledyne Electronic Systems, Inc. No publicly held company owns 10% or more of the stock of Allegheny Technologies Incorporated.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-27a) is reported at 316 F.3d 1366. The opinion of the Court of Federal Claims (Pet. App. 28a-108a) is reported at 50 Fed. Cl. 155.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 2003. A petition for rehearing or rehearing en banc was denied on March 31, 2003. Chief Justice Rehnquist

extended the time for General Motors Corporation ("GM") to file its petition to July 29, 2003, on which date it was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

The 1978 version of CAS 413, which is no longer in effect, provided in relevant part (4 C.F.R. § 413.50(c)(12) (1986)):

> If a segment is closed, the contractor shall determine the difference between the actuarial liability for the segment and the market value of the assets allocated to the segment, irrespective of whether or not the pension plan is terminated. * * * The difference between the market value of the assets and the actuarial liability for the segment represents an adjustment of previously determined pension costs.

The superseding 1995 CAS 413-50(c)(12) provides in relevant part (48 C.F.R. § 9904.413-50(c)(12) (2003)):

> If a segment is closed, * * * the contractor shall determine the difference between the actuarial accrued liability for the segment and the market value of the assets allocated to the segment, irrespective of whether or not the pension plan is terminated. The difference between the market value of the assets and the actuarial accrued liability for the segment represents an adjustment of previously-determined pension costs.
>
> * * * *
>
> (vi) The Government's share of the adjustment amount determined for a segment shall be the product of the adjustment amount and a fraction. * * * The numerator of such fraction shall be the sum of the pension plan costs allocated to all contracts and subcontracts * * * subject to this Standard during a period of years representative of the Government's participation in the pension plan. The denominator of such fraction shall be the total pension costs assigned to cost accounting

periods during those same years. This amount shall represent an adjustment of contract prices or cost allowance as appropriate. The adjustment may be recognized by modifying a single contract, several but not all contracts, or all contracts, or by use of any other suitable technique.

(vii) The full amount of the Government's share of an adjustment is allocable, without limit, as a credit or charge during the cost accounting period in which the event occurred and contract prices/costs will be adjusted accordingly.

1995 CAS 413-64, entitled "Transition method," provides in relevant part (48 C.F.R. § 9904.413-64 (2003)):

(c) [T]his Standard, effective March 30, 1995, clarifies, but is not intended to create, rights of the contracting parties, and specifies techniques for determining adjustments pursuant to [48 C.F.R. §] 9904.413-50(c)(12). These rights and techniques should be used to resolve outstanding issues that will affect pension costs of contracts subject to this Standard.

* * * *

(e) All adjustments shall be prospective only. However, costs/prices of prior and existing contracts not subject to price adjustment may be considered in determining the appropriate transition method or adjustment amount for the computation of costs/prices of contracts subject to this Standard.

STATEMENT

GM requests the Court to review the Court of Appeals' refusal to interpret the 1978 version of CAS 413 in a manner that would reprice GM's fixed-price government contracts—years or even decades after they were entered into and performed—in order to absolve GM of responsibility for its own investment decisions, or misfortune, that left its defined benefit pension plan with a deficit allegedly in excess of

$300 million. In so doing, GM discusses the applicable regulations in a contextual vacuum, ignoring the basic differences in how government fixed-price and cost reimbursement contracts operate, as well as the important differences between the government contract principles of cost allocation and cost allowability.

1. The Cost Accounting Standards Board ("CASB") was established by the Defense Production Act Amendments, Pub. L. No. 91-379, 84 Stat. 796 (1970).[1] The CASB promulgates Cost Accounting Standards that govern government contractors' cost accounting practices—specifically the "measurement, assignment, and allocation of costs to contracts with the United States Government." 48 C.F.R. § 9901.302(b) (2003). In establishing the CASB, Congress recognized the importance of cost accounting to government contracting, and, in so doing, expressly acknowledged the different manner in which cost accounting affects fixed-price and cost reimbursement contracts.

> There are two basic types of negotiated procurement contracts. One is termed a fixed price contract where the final price negotiated remains fixed unless a change is mutually agreed to. The second type is termed a cost-reimbursement contract wherein the final price depends upon the actual costs incurred during the life of the contract. In either case, an accurate measurement of cost is required. In the case of a fixed price contract, cost data are needed during the negotiation period; in the case

[1] The original CASB was an agent of Congress, independent of the Executive Branch, and consisted of the Comptroller General as chairman and four other members appointed by the Comptroller General. Section 719(a), Pub. L. No. 91-379, § 103, 84 Stat. 796 (codified at 50 U.S.C. App. § 2168(a)) (repealed Pub. L. No. 100-679, § 5(b), Nov. 17, 1988, 102 Stat. 4063). As noted below, the current CASB is of a different nature.

of a cost-reimbursement contract, cost data are needed throughout the contract.[2]

Congress' sensitivity as to *when* cost data are needed for fixed-price contracts was based on its recognition of the fundamental nature of fixed-price contracts. Unlike cost reimbursement contracts, once the price of a fixed-price contract is agreed upon, it does not change due to changes in the contractor's costs. 48 C.F.R. § 16.202-1 (2003).

Congress recognized the need for uniformity in cost accounting, and accordingly granted the CASB authority to "promulgate cost-accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense contractors and subcontractors under Federal contracts."[3] It is, however, incorrect to suggest, as GM does throughout its Petition, *see, e.g.*, Pet. 3, 23-24, that uniformity and consistency in *cost accounting practices* imply identical rights to *recover money* regardless of whether the costs were allocated to cost reimbursement or fixed-price contracts.

GM ignores the fundamental difference in how a change in a contractor's cost affects the rights of the parties to cost reimbursement versus fixed-price contracts—a distinction clearly recognized by Congress when it created the CASB. GM also ignores the important distinction between government contract cost *allocation* and government contract cost *allowability*. The CASB regulated the allocation of costs to "cost objectives"—e.g., contracts—and disclaimed any authority to regulate issues of cost allowability. The CASB explained the important difference between cost allocation

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[2] S. Rep. No. 91-890 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3768, 3770.

[3] Section 719(g), Pub. L. No. 91-379, § 103, 84 Stat. 796 (codified at 50 U.S.C. App. § 2168(g)) (repealed).

and cost allowability in its May 1977 Restatement of Objectives, Policies and Concepts:

> The CASB does *not* determine categories or individual items of cost that are allowable. *Allowability is a procurement concept affecting contract price and in most cases is established in regulatory or contractual provisions.* An agency's policies on allowability of costs may be derived from law and are generally embodied in its procurement regulations. * * *
>
> *Allocability is an accounting concept involving the ascertainment of contract cost*; it results from a relationship between a cost and a cost objective such that the cost objective appropriately bears all or a portion of the cost. * * *
>
> Cost Accounting Standards provide for the definition and measurement of costs, the assignment of costs to particular cost accounting periods, and the determination of the bases for the direct and indirect allocation of the total assigned costs to the contracts and other cost objectives of these periods. The use of Cost Accounting Standards has no direct bearing on the allowability of those individual items of cost which are subject to limitations or exclusions set forth in the contract or which are otherwise specified as unallowable by the Government.[4]

In other words, the original CASB never intended its Cost Accounting Standards to govern the extent to which the contracting parties could recover for costs incurred, or, similarly, the extent to which allocation of a *cost* to a particular contract affects the *price* of the contract. That was a function of the

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[4] Ct. App. JA 592-93, Cost Accounting Standards Board Restatement of Objectives, Policies and Concepts (May 1977), *reprinted in Cost Accounting Standards Guide* (CCH) ¶ 2920, at 4030-31 (2000) (emphasis added).

other procurement regulations addressing allowability and of the individual contracts' terms and conditions.

2. It was in this context that the original CASB promulgated the 1978 version of CAS 413, which addresses adjustments to pension costs. Pension costs for defined benefit pension plans are based on actuarial assumptions that inevitably prove to be inaccurate, and therefore must be regularly updated. When a government contractor's business is ongoing, 1978 CAS 413 provides for annual adjustments to pension costs that are amortized forward fifteen years. However, when a "segment closing" occurs—which the Court of Appeals held to include a company's sale of a government contracting division to which a portion of the company's previous pension costs had been allocated—it is no longer possible to amortize the adjustment to those costs over future years. 1978 CAS 413.50(c)(12) addresses how the pension cost adjustment is to be measured in such circumstances:

> If a segment is closed, the contractor shall determine the difference between the actuarial liability for the segment and the market value of the assets allocated to the segment, irrespective of whether or not the pension plan is terminated. * * * The difference between the market value of the assets and the actuarial liability for the segment represents an adjustment of previously determined pension costs.

4 C.F.R. § 413.50(c)(12).

3. The original CASB ceased to exist on September 30, 1980, when Congress failed to appropriate funds for it, but the Cost Accounting Standards promulgated by the original CASB, including 1978 CAS 413, remained in effect.[5] The current CASB ("new CASB") was created by the Office of Federal Procurement Policy Act Amendments of 1988.

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[5] *Cost Accounting Standards Guide* (CCH) ¶ 1032, at 2041 (1988).

41 U.S.C. § 422 (2003).[6] The new CASB would promulgate substantial revisions to CAS 413 in 1995, but those revisions do not apply here.

4. In 1993, prior to the promulgation of the 1995 version of CAS 413, GM sold a division that had performed government contracts. At the time of the sale, GM's defined benefit pension plans were under-funded—the actuarial estimates of fund liabilities exceeded the future value of fund assets.

GM was not content to record in its books an increase in its previously determined pension costs, as provided in the CAS in effect at that time. GM, instead, chose to interpret the 1978 version of CAS 413.50(c)(12) as entitling a contractor that had underestimated its pension costs to obtain a *payment* from the government. According to GM, this payment—the entire amount that purportedly would have been allocated to the contractor's government contracts had its original actuarial assumptions been completely accurate, plus earnings that this amount would have realized had it been in GM's pension fund for years or decades—would be made regardless of whether the terms of those contracts permit price adjustments for changes in a contractor's cost experience.[7]

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[6] Unlike the original CASB, the new CASB is a creature of the Executive Branch, located within the Office of Federal Procurement Policy. None of the members of the new CASB were members of the original CASB that promulgated 1978 CAS 413.

[7] It is fundamental that the price of a fixed-price contract is not adjusted based on changes in a contractor's cost experience. *See* 48 C.F.R. § 16.202-1:

> A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties.

GM eventually asserted a claim against the government for the entire so-called "government share" of GM's pension cost adjustment.

5. The contracting officer denied GM's claim, and GM filed suit in the Court of Federal Claims ("COFC"). At the time GM's suit was filed, lawsuits filed against the government by respondents Allegheny Teledyne, Inc., Teledyne, Inc., Teledyne Industries, Inc., and Teledyne Electronic Systems, Inc. (collectively "Teledyne") and General Electric Company ("GE"), also addressing the meaning of 1978 CAS 413, were pending.[8] The three cases were not formally consolidated in the COFC, although they were assigned to the same judge, who permitted each of the three non-government parties to participate as amici for purposes of briefing issues raised in cross-motions for partial summary judgment in the other two cases. After extensive briefing, the COFC conducted a single, day-long oral argument on cross-motions for summary judgment in all three cases, and subsequently issued an eighty-page opinion. Pet. App. 28a-108a. The COFC certified all issues decided for interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(2).

6. The Court of Appeals accepted the interlocutory appeals[9] and affirmed on all issues. Pet. App. 1a-27a. The Court of Appeals agreed with the COFC that while the pension cost adjustment prescribed by the 1978 version of CAS 413-50(c)(12) applies to all previously determined pension costs that were allocated to CAS-covered contracts,

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[8] Teledyne and GE also had sold divisions prior to the promulgation of 1995 CAS 413, at which time their respective defined benefit pension plans had surpluses. Teledyne and GE each filed suits raising issues concerning claims that the government filed based on 1978 CAS 413.

[9] GM appealed the COFC's holding regarding the effect of 1978 CAS 413 pension cost adjustments on fixed-price contracts. Teledyne and the government appealed holdings on other issues not relevant here. GE did not appeal the COFC opinion; its case is now proceeding in the COFC.

the right of a contracting party to a payment for a cost adjustment is based on the terms of the contract to which the adjusted costs were allocated, and fixed-price contracts do not permit a change in price based on such cost adjustments. Pet. App. 13a-20a.[10]

REASONS FOR DENYING THE PETITION

GM is challenging an opinion on interlocutory appeal that addresses a superseded government contract cost accounting standard. The Court of Appeals construed the 1978 version of CAS 413 based on its plain meaning, just as both tribunals that had previously construed it. Apparently recognizing that these factors militate against Supreme Court review, GM has attempted to present its case as one that is about the Federal Circuit's failure to properly defer to agency interpretations of regulatory provisions. However, that is not what this case is about, for two basic reasons.

First, in order for a court to properly defer to agency interpretations of statutes and regulations under the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), respectively, there must be some ambiguity or lack of clarity in the statute or regulation—some gaps that are necessary for the agency to fill in. That is not the case with 1978 CAS 413.50(c)(12). That provision of the CAS plainly addresses how an "adjustment of previously determined pension costs" is to be measured when a government contracting segment closes.

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[10] GM seriously mischaracterizes the holdings in both lower courts when it suggests that they concluded that the pension *cost adjustment* prescribed in 1978 CAS 413.50(c)(12) does not apply to fixed-price contracts. Both courts held that pension cost accounting adjustments apply to *all* CAS-covered contracts, including fixed-price contracts, but that the terms of GM's fixed-price contracts did not provide for any post-award *price adjustment*. Pet. App. 13a-20a, 62a-78a.

How such a pension cost adjustment affects the rights of the parties to government contracts to which those costs were allocated is determined by the terms of those contracts.[11]

By ignoring the fundamental principle that the terms of its government contracts govern the extent to which it may be compensated for an increase in its pension costs—and that fixed-price contracts do not allow for a change in price based on a change in its pension costs—GM pretends there is a gap in the regulations that must be resolved by deferring to agency interpretations. There is no gap. There was no need for the lower courts to defer to agency interpretations of what 1978 CAS 413.50(c)(12) means. Because this is *not* a deference case, the conflicts that GM asserts between the Federal Circuit's decision and agency deference decisions of other circuits—and with agency deference decisions of this Court—do not exist.

Second, even if it were necessary or appropriate to search agency interpretations to help construe the meaning of 1978 CAS 413.50(c)(12), the statements relied upon by GM cannot support its interpretation. As will be explained in detail, *infra*, these statements do not reflect agency-wide views or actual government practice in administering 1978 CAS

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[11] The COFC and Court of Appeals decisions rely on the plain meaning of CAS 413, an approach that is mandated by the most basic tenets of regulatory interpretation. GM's Petition ignores the fundamental rationale of the lower courts' decisions and wraps government contract cost accounting issues in an indictment of the Federal Circuit's adherence (or alleged lack thereof) to the *Chevron* doctrine—a doctrine that is inapplicable to the present case. The *Chevron* doctrine is applicable to an agency's interpretation of *statutes* the agency administers. *Chevron*, 467 U.S. at 842-43; *see also* I Richard J. Pierce, Jr., *Administrative Law Treatise* 139-47 (4th ed. 2002). *Seminole Rock* and its progeny relate to matters of *regulatory* interpretation. In this case, there was no basis for the lower courts to defer to agency interpretations under *Seminole Rock* because 1978 CAS 413, by its plain terms, addresses pension cost adjustments, *not* contract price adjustments.

413.50(c)(12). They were never endorsed by either CASB and they are disclaimed by the United States. In essence, GM is taking the unprecedented position that an agency should be saddled with an employee's interpretation of a regulation that the agency has never previously adopted and does not currently adopt.

GM's interpretation not only is inconsistent with the plain meaning of 1978 CAS 413.50(c)(12), but also would yield unfair and absurd results. Under GM's reading of the 1978 CAS, a company could: (1) underestimate the pension contributions necessary to meet its pension plan obligations; (2) submit lower bids for its fixed-price contracts than it would have submitted had it not underestimated the necessary pension contributions; (3) choose to sell off government contracting business units when its pension plans have actuarial deficits; and (4) then collect from the government the difference between the estimated and actual pension costs allocable to those contracts—plus earnings on the difference—even though inclusion of the actual pension costs in the prices originally bid would have increased the bid prices, and likely precluded the contractor from winning the competitively awarded fixed-price contracts in the first place.

GM's interpretation also would produce unfair and absurd results in situations where companies that are alleged to have pension *surpluses*—like Teledyne and GE—sell government contracting segments. In those situations, even though the fixed-price contracts specified that the contractors bear the risk that their costs might be higher than initially estimated—and reap the reward if costs turn out to be lower than initially estimated—the companies could be forced to "refund" large sums to the government. And they would be required to do so notwithstanding the fact that the purported "government share" of the pension surplus includes earnings on pension plan assets that the government had nothing to do with, and notwithstanding the fact that the companies could not and

cannot access the pension fund assets to finance the "government share" that would be owed without triggering severe tax penalties.[12]

In short, whether there is a pension surplus or deficit when a government contracting segment is sold, GM's interpretation of the 1978 version of CAS 413.50(c)(12) would result in an unjustified windfall for one of the parties. When, as alleged with respect to the Teledyne and GE sales, there is a surplus, the government would be the recipient of the windfall. When, as alleged with respect to the GM sale, there is a deficit, the contractor would be the recipient of the windfall—in the form of a taxpayer-subsidized pension deficit bailout.

The COFC and Federal Circuit opinions reflect judicial prudence and reticence to turn "interpretation" into judicial legislating. The courts were correct in their analysis of what 1978 CAS 413.50(c)(12) does and does not do with respect to fixed-price contracts, and, more importantly, the courts decided the issue correctly by fulfilling their obligation to interpret the regulation in accordance with its plain meaning.

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[12] Although GM claims that the government collected for amounts that had been allocated to fixed-price contracts prior to 1995, the record contains no evidence whatsoever to support that claim. Neither GM nor any of the sources upon which it relies can cite to a single transaction in which the government actually recovered under 1978 CAS 413.50(c)(12) for adjustment of pension costs that had been allocated to fixed-price contracts. *See infra* pp. 21-22.

I. 1978 CAS 413 IS CLEAR AND UNAMBIGUOUS, MAKING DEFERENCE TO AGENCY INTERPRETATION OF THE REGULATION UNWARRANTED

A. The COFC And The Court Of Appeals Correctly Found 1978 CAS 413 To Be Clear And Unambiguous

The COFC and the Court of Appeals concluded that the plain meaning of the 1978 version of CAS 413 did not permit the adjustments to fixed-price contracts sought by GM. In arriving at this conclusion, the courts examined the precise language of both the 1978 and 1995 versions of CAS 413, as well as the context in which the accounting standard was implemented, operative Federal Acquisition Regulation provisions, and the prescribed terms of government fixed-price contracts. The courts below soundly rejected GM's interpretation of 1978 CAS 413 and determined that there was no occasion to look to any agency interpretation of the accounting standard.

The COFC concluded that CAS 413, by its terms, does not provide for recovery of any pension plan surplus or deficit attributable to fixed-price contracts. Pet. App. 62a. The court rejected GM's argument that negotiations between the government and contractors regarding payments for pension surpluses or deficits was necessary pursuant to 1978 CAS 413.50(c)(12). *Id.* at 67a. The court observed that the CASB *deleted* from an earlier proposed version of the regulation any "reference to 'negotiation'" that GM argues is required by (although not mentioned in) 1978 CAS 413.50(c)(12). *Id.*

The COFC also compared 1978 CAS 413 to the 1995 version and concluded:

> Contrary to GM's contentions, however, the language of the *new* CAS 413 makes plain that the inclusion of the pension surplus or deficit attributable to firm-fixed-

> price contracts is a departure from the original CAS 413.50(c)(12). In the 1995 CAS 413, the CASB included CAS 413.64, which sets forth the "transition method" for implementing the new CAS 413. CAS 413.64 makes clear that recovery of the pension surplus attributable to fixed-price contracts is new.

Id. at 73a (emphasis added). Accordingly, the COFC looked only to the regulation's plain meaning and rejected GM's "agency interpretation" argument.

The Court of Appeals arrived at the same conclusion, holding that the 1995 version of CAS 413, by its express terms, did substantially more than clarify its 1978 predecessor. *Id.* at 14a. The Court of Appeals concluded that GM's interpretation of 1995 CAS 413-64(e)—a provision which makes it clear that the CASB construed 1978 CAS 413.50(c)(12) *not* to authorize price adjustments to fixed-price contracts—was "illogical." *Id.* at 20a.[13] Accordingly, GM's attempt to read into 1978 CAS 413 a meaning wholly different from its plain language was properly rejected by the Court of Appeals.

In *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995), the Court ruled that the plain meaning of Medicare reimbursement regulations could be assessed by looking at the context surrounding the text of the regulation in question and considering the organization of subparts in the relevant section and their titles. Likewise, in *Municipal Resale Service Customers v. FERC*, 43 F.3d 1046 (6th Cir. 1995), the Sixth Circuit held that regulations promulgated pursuant to the Federal Power Act were unambiguous. "Simply put, the language at issue, when viewed both in isolation and in the context of the entire regulation, plainly creates a conclusive presumption." *Id.* at 1053; *see also* Lars Noah, *Divining Regulatory Intent: The Place for a*

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[13] *See infra* Section II.

"Legislative History" of Agency Rules, 51 Hastings L.J. 255, 287-90 (2000) (discussing the need for textual ambiguity as a necessary prerequisite to judicial deference to agency interpretation). The decisions below are based on the plain meaning of 1978 CAS 413. Accordingly, consideration of the interpretations proffered by GM was unwarranted and unnecessary.

B. *Seminole Rock* Deference To An Agency's Interpretation Of A Regulation Is Not Warranted Where The Regulation Is Clear And Unambiguous

The COFC and the Court of Appeals were correct in their decision *not* to consider the interpretive analysis upon which GM continues to insist. In fact, the unambiguous nature of 1978 CAS 413 would prohibit deference to an agency's interpretation, assuming *arguendo* that an agency interpretation even exists.

A court must first determine that a regulation is ambiguous before considering an agency's interpretation of the regulation. If the court concludes that the regulation is unambiguous, deference to the agency's interpretation is inappropriate. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *see also* Scott H. Angstreich, *Shoring Up Chevron: A Defense Of Seminole Rock Deference To Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 71 (2000) ("If the court finds the regulation has a clear meaning, then for all practical purposes that is the end of the matter: if the agency disagrees, then the court will not defer; if the agency agrees, then the deference doctrine does no[t] work." (footnotes omitted)); Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 Ariz. St. L.J. 109, 117-18 (1990) (citing *Shea v. Vialpando*, 416 U.S. 251, 262 n.11 (1974) ("If the language [in a regulation] is clear, there is no need for interpretation. The court can simply declare what the statute or regulation means. If the agency's interpretation

conflicts with the language, the interpretation is invalid.")). As the Court held in *Christensen*, an ambiguity in the regulation is a necessary prerequisite to *Seminole Rock* deference. 529 U.S. at 588. Since neither the COFC nor the Court of Appeals found 1978 CAS 413 to be ambiguous, consideration of an agency interpretation was unwarranted and unnecessary.

C. GM's Proposed Interpretation Does Not Reflect Any Agency Interpretation

Even if the 1978 version of CAS 413 had required clarification, the statements upon which GM relies would still not be entitled to *Seminole Rock* deference. First, *Seminole Rock* presumes that there is an *agency* interpretation to which the court can defer. GM has proffered no such interpretation. Instead, GM points to isolated statements made by selected individuals that do not reflect a cognizable interpretation by either the promulgating or implementing agency.[14] Second, even if GM's position reflected a cognizable agency interpretation, the COFC and the Court of Appeals correctly ruled that GM's position was "illogical." Pet. App. 20a. The lower courts specifically held that GM's interpretation of

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[14] GM cites to the following pages of the Court of Appeals Joint Appendix for the proposition that "it had been consistent government practice for almost two decades to calculate the government's share of pension liabilities using a ratio that included both fixed-price and cost-type contracts"—Ct. App. JA 379, 681-702, 735, 746-47, 3049-52, 1310-13. Pet. 6-7. In fact, the record contains no evidence that the government ever obtained such reimbursements, and the sources cited by GM do not establish that the government obtained such reimbursements. Most of the sources cited by GM address another issue entirely—the extent to which CAS-covered fixed-price contracts should be covered within the ambit of the CAS clause equitable adjustment provision. The CAS clause equitable adjustment provision entitles parties to a CAS-covered fixed-price contract to an adjustment in the contract price in limited circumstances that have nothing to do with pension cost adjustments. *See infra* note 15 and accompanying text.

CAS 413 contradicted a number of accounting standards and well-established government contracting principles applicable to fixed-price contracts. *Id.* at 20a, 64a-78a. Accordingly, the statements upon which GM relies are plainly erroneous and, therefore, not worthy of deference.

1. *There were no promulgating agency interpretations upon which a court could properly rely to support GM's interpretation*

The lower courts appropriately rejected GM's reliance on statements made by three sources. The first of these was Bernard Sacks, an associate director but not a member of the original CASB. Mr. Sacks prepared an unpublished file memorandum of a meeting that he and Jett McCormick, the CASB's legal counsel, had with Department of Defense ("DoD") officials after 1978 CAS 413 was promulgated. GM relies on the following passage from that memorandum:

> Mr. Wruble [of the DoD] questioned the legal basis for making a settlement under a fixed-price contract. Mr. McCormick replied that the inclusion of the CAS clause in the contract embodies the provision of the Standard and provides a legal basis for making a settlement.

Ct. App. JA 684; *see* Pet. 13. This passage from an unpublished memorandum does not constitute the CASB's (or any other agency's) interpretation of CAS 413. The COFC correctly noted that "GM has not produced any evidence to show that the CASB shared Mr. Sacks's view." Pet. App. 68a.

As the Federal Circuit noted in *Eastman Kodak Co. v. Rumsfeld*, 317 F.3d 1377, 1379-81 (Fed. Cir. 2003) (citing *Perry v. Martin Marietta Corp.* 47 F.3d 1134 (Fed. Cir. 1995)), courts defer to materials published by the CASB for the express purpose of aiding in the interpretation of Cost Accounting Standards. *See also Christensen*, 529 U.S. at 587

(quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (less formal agency pronouncements are only "'entitled to respect'" to the extent that they have "the power to persuade"). The memorandum upon which GM relies was neither published by the CASB, nor was it written to aid in the interpretation of CAS 413. It has never been adopted by the CASB and has been expressly disclaimed by the United States. Accordingly, the COFC and the Court of Appeals concluded that the memorandum was not an agency interpretation worthy of deference.

Even if the passage from the Sacks memorandum relied upon by GM reflected the CASB's interpretation of CAS 413—which it did not—Mr. Sacks' opinion was plainly erroneous and lacked the power to persuade. His reasoning was circular and nonsensical. The fact that the CAS clause contained in government contracts "embodies the provision of * * * [Cost Accounting] Standard [413]" begs the question of what CAS 413 actually says. 1978 CAS 413 addresses adjustments to previously determined pension costs; it does not address contract pricing. Moreover—and tellingly—the CAS clause to which Mr. Sacks' memorandum referred only provides for adjustments to the prices of fixed-price contracts in very limited circumstances, none of which includes changes in a contractor's costs.[15]

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[15] The CAS clause equitable adjustment provision entitles parties to a CAS-covered fixed-price contract to an adjustment in the contract price in three limited circumstances: (1) the failure of a contractor to comply with an applicable cost accounting standard; (2) the failure of a contractor to follow its disclosed cost accounting practices; or (3) the imposition of a requirement on the contractor to comply with a new or revised cost accounting standard that was not in effect when the contract was entered. Ct. App. JA 1013-15, 48 C.F.R. § 52.230-3(a)(4)-(5) (1988). The fact that the CAS clause can entitle a contractor or the government to an adjustment in the price of a fixed-price contract under these limited circumstances, however, is irrelevant to pension cost adjustments. The CAS clause does *not* allow changes in the price of a fixed-price contract

Seminole Rock expressly provides that an agency interpretation is not entitled to deference if it is "plainly erroneous or inconsistent with the regulation." 325 U.S. at 414; *see, e.g., Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 356 (2000) (refusing to defer to FHWA interpretation of warning device regulations); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (Secretary of HHS interpretation evaluated to determine whether plainly erroneous or inconsistent with plain language of regulation); *United States v. Larionoff*, 431 U.S. 864, 872-73 (1977) (Navy interpretation of regulations inconsistent with statutory framework regarding reenlistment bonuses); *INS v. Stanisic*, 395 U.S. 62, 72 (1969) (INS interpretation of regulations evaluated to determine whether plainly erroneous or inconsistent with plain language of regulation); *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 276 (1969) (HUD circular considered in interpreting ambiguous regulation since circular was not plainly erroneous or inconsistent with regulation); *Mun. Resale Serv. Customers v. FERC*, 43 F.3d 1046, 1053 (6th Cir. 1995) (citing *Univ. of Cincinnati v. Bowen*, 875 F.2d 1207, 1209 (6th Cir. 1989)) (FERC interpretation of regulation that is inconsistent with the regulation's express language is plainly erroneous). Thus, a court must assess whether an agency interpretation is consistent with the regulation in question before it defers to that interpretation. The Sacks memorandum, even if it rose to the level of an agency interpretation—which it did not—was inconsistent with the language in 1978 CAS 413, and for that reason it was properly disregarded by the lower courts.

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based on a contractor's cost experience in performing the contract generally, or for changes in pension costs in particular.

2. *There were no implementing agency interpretations upon which a court could properly rely to support GM's interpretation*

Similarly, the COFC and the Court of Appeals were correct in not deferring to statements contained in a 1993 DoD Inspector General's office report regarding the purported right of the government to recover based on amounts previously allocated to fixed-price contracts when a company sells a government contracting segment and the contractor has a surplus in its defined benefit pension plan. The 1993 report, contrary to GM's argument, Pet. 18 n.6, does not establish that DoD had a long-term practice of obtaining recoveries for pension cost adjustments under fixed-price contracts. In fact, as recognized by the Court of Appeals and the COFC, Pet. 16a-17a, 71a, the report establishes that there was *disagreement* within DoD as to whether the government had the right to do so. Ct. App. JA 1310.

Finally, GM's reliance on a declaration it obtained for purposes of this litigation from former Defense Contract Audit Agency ("DCAA") Deputy General Counsel John N. Ford—for the proposition that the government is entitled to a recovery under fixed-price contracts, and that the government actually *obtained* such recoveries prior to amendment of CAS 413 in 1995—is misplaced. According to Mr. Ford, the *DCAA position* was that the government was entitled to recoveries for adjustments of pension costs previously allocated to fixed-price contracts, and the government would "expect" such recoveries. Ct. App. JA 3051. However, *Mr. Ford fails to cite a single transaction in which this actually occurred.* Ironically, in the only specific case cited by Mr. Ford, the DCAA took the position that the government could recover for pension cost adjustments under fixed-price contracts, but that position was expressly rejected by the Armed Services Board of Contract Appeals. *See* Ct. App. JA 3050; *Appeal of Gould, Inc.*, ASBCA No. 46759, 97-2

BCA ¶ 29,254 (Sept. 19, 1997). In any event, neither Mr. Ford, GM, or anyone else upon whom GM has relied has cited a single transaction in which the government actually recovered under 1978 CAS 413.50(c)(12) for an adjustment of pension costs that had been allocated to fixed-price contracts.

In summary, there is no support whatsoever in the record for the proposition that DoD—or any other implementing agency—even *had* an interpretation and consistent practice supporting GM's position, let alone that the lower courts should have deferred to it.

II. GM IGNORES A KEY PROVISION FROM THE TRANSITION SECTION OF 1995 CAS 413

In 1995 the new CASB promulgated substantial amendments to CAS 413, including new language in CAS 413-50(c)(12) addressing, for the first time, adjustments to contract *prices* resulting from pension plan surpluses or deficits upon closing of government contracting segments. 48 C.F.R. § 9904.413-50(c)(12)(vii). Throughout its Petition, to support its argument that CAS 413 mandated price adjustments to fixed-price contracts all along, GM relies heavily on 1995 CAS 413-64*(c)*, which states that "this Standard, effective March 30, 1995, clarifies, but is not intended to create, rights of the contracting parties, and specifies techniques for determining adjustments pursuant to [48 C.F.R. §] 9904.413-50(c)(12)." Pet. 5, 10, 26.

Conspicuous in its absence from GM's Petition is any reference whatsoever to *subparagraph (e)* to 1995 CAS 413-64, which makes clear that, notwithstanding any intent the new CASB may have had to "clarify" the original CAS, the 1995 CAS 413-50(c)(12) provision permitting recovery for

adjustment of pension costs previously allocated to fixed-price contracts is a *change* from 1978 CAS 413.50(c)(12):

> (e) All adjustments shall be prospective only. However, costs/prices of prior and existing contracts *not subject to price adjustment* may be considered in determining the appropriate transition method or adjustment amount for the computation of costs/prices of contracts subject to this Standard.

48 C.F.R. § 9904.413-64(e) (emphasis added).

As the COFC and the Court of Appeals recognized, sub-paragraph (e) to 1995 CAS 413-64 makes it even clearer that 1978 CAS 413 did not authorize contract price adjustments. In the proceedings below, GM could not satisfactorily explain what—if *not* fixed-price contracts—the new CASB possibly could have meant when it referred to "prior and existing contracts not subject to price adjustment." Pet. App. 19a-20a, 73a-74a & n.24.[16] Apparently recognizing that it has no credible explanation for this plainly relevant but "unhelpful" provision in 1995 CAS 413, GM now has decided to deal with it simply by not bringing it to the Court's attention.

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[16] GM argued in the lower courts that the new CASB must have been referring to contracts that were not covered by the Cost Accounting Standards. The COFC and the Court of Appeals each correctly rejected this argument as illogical, because when the CASB amended CAS 413 in 1995, it did not suggest that the *revised* version of the Standard would govern non-CAS-covered contracts. Pet. App. 19a-20a, 73a-74a & n.24.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HARVEY G. SHERZER *
SCOTT ARNOLD
BRADLEY D. WINE
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037
(202) 785-9700

Counsel for Respondents Allegheny Teledyne, Inc., Teledyne, Inc., Teledyne Industries, Inc., and Teledyne Electronic Systems, Inc.

* Counsel of Record

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